

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

Rules and Regulations Implementing the
Telephone Consumer Protection Act of
1991

Communication Innovators Petition for
Declaratory Ruling

CG Docket No. 02-278

**Reply to the Reply Comments of American Bankers Association [sic]
and Consumer Bankers Association**

The reply comments of the Comments of American Bankers Association [sic] and Consumer Bankers Association contain several legal and logical fallacies.

First, ABA and CBA note the Commission bifurcated the *degree* of consent needed for autodialed or prerecorded messages to cell phones, imposing a written consent requirement for solicitations, and an oral consent requirement for non-solicitations. The basis for such a bifurcation, however, is grounded in the fact that express consent is in essence a contractual waiver, and some waivers need to be more explicit (and provable). This is no different than the requirement that waivers or consent in a number of different legal situations require written releases, whereas in other contexts, they may be done orally. Put another way, there was legal and logical room for the Commission the make such a bifurcation.

There is no such room for bifurcation in the definition of “automatic telephone dialing system.” Equipment either is within the definition, and governed by the statute, or it is not, and it is wholly ungoverned. Similarly, the bifurcation of consent between written and oral, is a matter of degree—the calls are still regulated by the same provisions of the TCPA. The instant petition is an all-or-nothing proposition because these calls and messages made with this “non-ATDS” device would be wholly outside the TCPA provisions of autodialed calls to cell phones if the petition were granted.

The other major flaw in the comments of ABA and CBA is the fact that while supporters of the petition repeatedly claim they will be sending “informational” messages, they already have a significant accommodation from the Commission and are treated much more leniently by existing Commission rules because they only need *oral* consent, and not *written* consent. Furthermore, they use illustrations of sending “informational” messages to their own customers, but if the petition were granted, then this “device” (that can send millions of text messages or make millions of calls but is not an ATDS) will not be limited to calling existing customers. Notably, the petition does not ask for the exemption to only apply to calls placed to an existing customer—and I doubt such an oversight was accidental.

It seems what the petition and its supporters is asking for is creation of an “established business relationship” for autodialed “informational” calls to cell phones. This is blatant cost-shifting to consumers. The Commission lacks the legal authority to create such an exemption, and it would fly in the face of the recent

action by the Commission (and FTC) to *remove* EBR exemptions from similar TCPA rules.

If businesses want to send informational messages to their customers' cell phones, then simply ask those customers for permission. It can be done orally. They are, after all, your customers. If the "informational" messages they want to send are so "desirable" then they should have little trouble getting their customers to consent to those calls and messages.

The current Commission language is adequate

The Commission's current construction of ATDS squarely fits gravamen of the original target of this portion of the TCPA—automated devices that make calls without meaningful human intervention required to dial each individual call. That is still a good—and practical—application of the Commission's interpretive authority.

Respectfully submitted,